

The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission

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Robert C. O'Brien*

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Introduction

On August 2, 1990, Iraq invaded Kuwait. Iraq's almost seven month occupation of Kuwait ended on March 2, 1991, when Kuwait was liberated by the United Nations Allied Coalition and Kuwaiti armed forces. As a consequence of the invasion and liberation, Kuwait's "electric power, telecommunications and transportation systems [were] wrecked, [and its] government buildings and other public institutions heavily damaged or looted."¹ Moreover, "much of the country's petroleum industry was pillaged and sabotaged" as was "graphically evidenced by the hundreds of fires that were set off by blowing up the oil wells."² In response to the damage caused by Iraq's invasion and occupation of Kuwait, the international community created the United Nations Compensation Commission (UNCC).³

On December 18, 1996, the UNCC's Governing Council approved the recommendations made by a panel of commissioners and awarded the Kuwait Oil Company (KOC) \$610,048,547 for its claim against Iraq based on the costs KOC incurred fighting the massive oil well fires left burning in Kuwait after the country's liberation.⁴ The claim, which is officially reported by its UNCC claim title as the "Well Blowout Control Claim" (WBC Claim), was the first category "E" corporate claim decided by the Commission. The approval of the WBC Claim award, together with the appointment by the Governing Council of two additional panels to review category "E" corporate claims and the first two panels to review category "F" claims, marks a shift in the Commission's focus from small individual claims to the larger and more complex corporate and government claims.⁵

1. *Report to the Secretary-General by a United Nations Mission, Led by Mr. Abdulrahim A. Farah, Former Under-Secretary-General, Assessing the Scope of Damage and Nature of Damage Inflicted on Kuwait's Infrastructure During the Iraqi Occupation of the Country from 2 August 1990 to 27 February 1991*, U.N. SCOR, 46th Year, Annex, U.N. Doc. S/22535 (1991).

2. *Id.* at 15.

3. For a discussion regarding the creation of the UNCC by the Security Council, see *infra* notes 13-21 and accompanying text.

4. *Decision Concerning the Well Blowout Control Claim* [Dec. 40], U.N. SCOR, U.N. Compensation Comm'n Governing Council, 51st Year, U.N. Doc. S/AC.26/Dec.40 (1996). See also *Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim (the "WBC Claim")*, U.N. SCOR, U.N. Compensation Comm'n Governing Council, 51st Year, U.N. Doc. S/AC.26/1996/R.27/Annex (1996) [hereinafter *WBC Claim Report*].

5. See, e.g., United Nations Information Service Press Release, *United Nations Compensation Commission Appoints Commissioners for the Review of Higher Amounts Individual Claims, Corporate Claims and Governmental Claims*, U.N. Doc. IK/96/7 (1996); Jeffrey Jannuzzo, *On Two Fast-Track UN Agreements*, THE TIMES (London), Dec. 24, 1996, at 29.

The Governing Council established six categories of claims to be filed with the United Nations Compensation Commission:

1. Category "A" claims are individual claims for departure from Iraq or Kuwait;
2. Category "B" claims are individual claims for serious personal injury or death;
3. Category "C" claims are individual claims for damages up to US\$100,000;
4. Category "D" claims are individual claims for damages over US\$100,000;
5. Category "E" claims are claims of corporations and other entities;

Since it began operations in 1991, the Commission has, for humanitarian reasons, focused its attention on resolving the claims of individual victims of Iraq's invasion and occupation of Kuwait.⁶ As of March 1997, the Commission had processed and approved for payment approximately 862,000 category "A" claims for persons forced to depart from Iraq and Kuwait. Of these approved claims, 57,636 have been paid in full.⁷ Further, the UNCC has processed and paid in full approximately 4,000 category "B" claims for severe personal injury or death.⁸ Also, the Commission had processed and approved for payment approximately 201,000 category "C" claims for personal losses or damages valued up to \$100,000.⁹ Due to the huge number of claimants, the majority of the category "A," "B" and "C" claims were verified using, in part, techniques developed to deal with mass tort claims in the United States.¹⁰

Unlike most of the individual claims,¹¹ many of the corporate and government claims assert losses in the millions and even billions of dollars. The total asserted value of the more than 6,000 category "E" claims is \$82 billion and that of the 282 category "F" claims is over \$100 billion.¹² Due to their magnitude, these claims will require a closer review by the Commission than was applied to claims in the individual loss categories. In fact, if the WBC Claim precedent is followed, the proceedings in categories

6. Category "F" claims are claims of Governments and international organizations.

U.N. Compensation Comm'n, *The Claims* (visited Sept. 16, 1997) <<http://www.unog.ch/uncc/claims.htm>>.

6. See Jannuzzo, *supra* note 5, at 29.

7. See *United Nations Compensation Commission Pays Out \$144 Million*, M2 PRESSWIRE, Mar. 18, 1997, available in LEXIS, World Library, Allwd File; *Compensation Commission to Pay Additional Claims Early Next Year If Iraq Begins Selling Oil in December*, M2 PRESSWIRE, Dec. 4, 1996, available in LEXIS, World Library, Allwd File.

8. See *United Nations Compensation Commission Pays Out \$144 Million*, *supra* note 7.

9. *Id.*

10. See, e.g., *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages Up to US\$100,000 (Category "C" Claims)*, U.N. SCOR, U.N. Compensation Comm'n, 49th Year, U.N. Doc. S/AC.26/1994/R.18 (1994) [hereinafter "C" Report], reprinted in 2 GULF WAR CLAIMS REP. No. 1, at II/R-119 (1995) [hereinafter GULF WAR CLAIMS REP.] ("Proceedings in the context of mass torts, primarily in the United States, have developed sophisticated methods for resolving massive filings."). See also Christopher S. Gibson, *Mass Claims Processing: Techniques for Processing Over 400,000 Claims for Individual Loss at the United Nations Compensation Commission*, in THE UNITED NATIONS COMPENSATION COMMISSION [Thirteenth Sokol Colloquium] (Richard B. Lillich ed., 1995) [hereinafter UNITED NATIONS COMPENSATION COMMISSION].

11. There are approximately 11,000 individual claims filed in category "D," the category for claims asserting losses in excess of \$100,000. See U.N. Compensation Comm'n, *supra* note 5. These claims resemble both the smaller individual claims in the "A," "B" and "C" categories and the typically larger corporate and government claims in the "E" and "F" categories. Based on my experience with the Commission, I consider it likely that these category "D" claims will be processed using a mix of verification techniques, including the mass tort claim methods used in categories "A," "B" and "C," and the more rigorous methods used to process the corporate and government claims discussed herein.

12. See Neil King, *Firms Seek Billions of Dollars to Cover Gulf War Losses*, WALL ST. J. (Eur. ed.), Aug. 19, 1997, at 1; U.N. Compensation Comm'n, *The Claims*, *supra* note 5.

"E" and "F," at least for the large and complex claims, may more closely resemble traditional arbitrations, in which both parties make submissions and proffer evidence to the Panel, than the mass-processing approach taken in processing claims in categories "A," "B," and "C". The category "E" and "F" claims present the Commission with a significant challenge: to review and decide the merits of those claims in a speedy fashion while still providing due process to Iraq.

This Article focuses on the institutional framework that has been created to allow the Commission to meet this challenge. Part I reviews the establishment of the Commission by the United Nations Security Council. Part II discusses the nature and purpose of the Commission's proceedings, including the roles of the Secretariat and the panels of Commissioners. Finally, Part III examines the procedural rules governing the verification of claims by the panels making specific reference to the WBC Claim experience.

I. The Establishment of the Commission

Although claims commissions are not new to international law,¹³ scholars heralded the establishment of the Commission by the United Nations as "unique" and "unprecedented."¹⁴ Indeed, the UNCC is the first claims commission of its kind established by the Security Council.¹⁵ On April 8,

13. See David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL. 1 (1994).

14. *Id.* at 1-2. Also,

The creation of the Fund and the Commission represent a remarkable milestone in international law as a reparations system with a built-in enforcement mechanism. While possible because of the unique nature of the international oil markets, the Fund could represent a watershed in establishing a means other than force to impose international law in the wake of war.

GULF WAR CLAIMS REP., *supra* note 10, at II-1; Stanley J. Glod, *International Claims Arising from Iraq's Invasion of Kuwait*, 25 INT'L LAW. 713, 719 (1991) ("A multinational or international claims tribunal is without precedent."). But see Bederman, *supra* note 13, at 2 ("[T]he UNCC is not as original or as unique as one might suppose. I believe, instead, that the UNCC is part of a long tradition of international claims practice.").

15. The creation of the Commission and its role in international law has spawned numerous publications and law journal articles. See, e.g., MARCO FRIGESSI DI RATTALMA, NAZIONI UNITE E DANNI DERIVANTI DALLA GUERRA DEL GOLFO (DOTT. A. Giuffrè ed., 1995); Bachir Georges Affaki, *The United Nations Compensation Commission—A New Era in Claims Settlements?*, 10 J. INT'L ARB. 21 (1993); Bachir Georges Affaki, *La Commission d'indemnisation des Nations Unies: Trois Ans D'épreuve au Service du Règlement des Différends Internationaux*, 20 DR. & PRAT. COMM. INTERN. 471 (1994); Carlos Alzamora, *Reflections on the UN Compensation Commission*, 9 ARB. INT'L 349 (1993); Pierre d'Argent, *Le Fonds et la Commission de Compensation des Nations Unies*, 25 REV. BELGE DE DROIT INT'L 485 (1992); ASIL Proceedings, *Claims Against Iraq: The UN Compensation Commission and Other Remedies*, 1992 AM. SOC'Y INT'L L. PROC. 477; Markham Ball, *The Iraq Claims Process—A Progress Report*, 9 J. INT'L ARB. 37 (1992); Ronald J. Bettauer, *The United Nations Compensation Commission—Developments Since October 1992*, 89 AM. J. INT'L L. 416 (1995); Charles N. Brower, *The Lessons of the Iran-United States Claims Tribunal: How May They Be Applied in the Case of Iraq?*, 32 VA. J. INT'L L. 421 (1992); Charles N. Brower, *Lessons to be Drawn from the Iran-U.S. Claims Tribunal*, 9 J. INT'L ARB. 51 (1992); Charles N. Brower, *The United Nations Sets the Stage for Gulf War Compensation Claims*, 8 J. INT'L ARB. 7 (1991); John R. Crook, *The United Nations Compensation Commission: A*

1991, in Resolution 687, the Security Council declared that Iraq's aggression in Kuwait made it "liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, [resulting from its] unlawful invasion and occupation of Kuwait."¹⁶

In making this declaration, the Security Council was "conscious of the need to take [such] measures . . . under Chapter VII of the Charter."¹⁷ The WBC Claim Panel took note of this reference to Chapter VII in Resolution 687 when it held that the Security Council "exercised its powers under that Chapter to maintain and restore international peace and security."¹⁸

New Structure to Enforce State Responsibility, 87 AM. J. INT'L L. 144 (1993); Gilles Cottereau, *Responsabilité de l'Iraq: Aperçu Sur les Indemnités Urgentes des Personnel Physiques*, XLI ANN. FR. DE DR. INT. 151 (1995); Gilles Cottereau, *De la Responsabilité de L'Iraq Selon la Résolution 687 du Conseil de Sécurité*, XXXVII ANN. FR. DE DR. INT. 99 (1991); Marco Frigessi di Rattalma, *Le Régime de Responsabilité Internationale Institué par le Conseil D'administration de la Commission de Compensation des Nations Unies*, 1010 REV. GEN. DR. I. PUBL. 45 (1997); Bernhard Graefrath, *Iraqi Reparations and the Security Council*, 44 Z. AÖR. U. V. (1995) [hereinafter *Iraqi Reparations*]; Bernhard Graefrath & Manfred Mohr, *Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait*, 43 ÖSTERR. ZEITSCHR. F. ÖFF. RECHT 109 (1992); Veijo Heiskanen, *Yhdistyneiden Kansakuntien Korvauskomissio*, 3 LAKIMIES 404 (1995); William E. Huth, *Iraq Claims Tribunal: A New Approach to the Settlement of International Commercial Disputes*, 23 INT'L BUS. LAW. 430 (1995); Adam A. Levy, *The Persian Gulf War Cease-Fire Agreement Compared with the Japanese Peace Treaty in Terms of Reparations and Reconstruction*, 10 DICK. J. INT'L L. 541 (1992); Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 86 AM. J. INT'L L. 346 (1992); Arthur W. Rovine, *An Iraqi Claims Process: Where and How?*, 2 AM. REV. INT'L ARB. 102 (1992); Arthur W. Rovine, *An Iraqi Claims Process: Where and How?*, 1 AM. REV. INT'L ARB. 411 (1992); Major Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1 (1992); Brigitte Stern, *Un Systeme Hybride: la Procédure de Règlement Pour la Réparation des Dommages Résultant de L'occupation Illicite du Koweït par l'Irak*, 37 MCGILL L.J. 625 (1992); Sompong Sucharitkul, *The Process of Peace-Making Following Operation "Desert Storm"*, 43 ÖSTERR. ZEITSCHR. F. ÖFF. RECHT 1 (1992); Nicolas C. Ulmer, *The Gulf War Claims Institution*, 10 J. INT'L ARB. 85 (1993); Carmel Whelton, *The United Nations Compensation Commission and International Claims Law: A Fresh Approach*, 25 OTTAWA L. REV. 607 (1993); Norbert Wühler, *Ansprüche Gegen Irak vor der United Nations Compensation Commission*, RECHT UND PRAXIS DER SCHIEDSGERICHTSBARKEIT, Beilage 5 zu BETRIEBSBERATER 23 (1996); Rex J. Zedalis, *Gulf War Compensation Standard: Concerns Under the Charter*, 26 REV. BELGE D.I. 333 (1993).

See also Elyse J. Garmise, *The Iraqi Claims Process and the Ghost of Versailles*, 67 N.Y.U. L. REV. 840 (1992); Luan Low & David Hodgkinson, *Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War*, 35 VA. J. INT'L L. 405 (1995); Gregory Townsend, Note, *The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & U.S. Remedies*, 17 LOY. L.A. INT'L & COMP. L.J. 973 (1995).

16. S.C. Res. 687, U.N. SCOR, 46th Year, Res. & Dec. at 16, U.N. Doc. S/RES/687 (1991), reprinted in 30 I.L.M. 847, 852 (1991). As early as October 1990, the Security Council, acting under Chapter VII of the United Nations Charter, had "reminded" Iraq that, "under international law it is liable for any loss damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait . . ." S.C. Res. 674, U.N. SCOR, 45th Year, Res. & Dec. at 8, U.N. Doc. S/RES/674 (1990), reprinted in 29 I.L.M. 1561, 1563 (1990).

17. S.C. Res. 687, *supra* note 16, reprinted in 30 I.L.M. at 849.

18. WBC Claim Report, *supra* note 4, ¶ 67, at 22. The Security Council's authority under Chapter VII to establish a compensation commission has, however, been ques-

To implement Resolution 687, the Security Council directed the Secretary-General to create a fund to compensate the victims of Iraq's aggression and ordered Iraq to contribute to the fund based on a percentage of the value of its future petroleum exports.¹⁹ One month after passing Resolution 687 and in response to a report by the U.N. Secretary-General,²⁰ the Security Council established the UNCC as a subsidiary organ at the United Nations' European headquarters in Geneva.²¹

The UNCC is composed of three bodies: the Governing Council, the Commissioners, and the Secretariat. The Governing Council, whose membership reflects the composition of the Security Council at any given time, is responsible for "establishing guidelines on all policy matters . . . [organizing] the work of the Commission and the procedures to be applied to the processing of claims and to the settlement of disputed claims . . ." ²² Importantly, the "amounts recommended by the panels of Commissioners

tioned by some commentators. See, e.g., Garmise, *supra* note 15, at 864 ("The U.N. Charter does not give the Security Council the specific power to deal with war reparations or the adjudication of war claims."); Graefrath, *Iraqi Reparations*, *supra* note 15, at 22 ("The establishment of the Compensation Fund and the Compensation Commission by res. 692 (1991) as well as the imposition of the procedure applied by the Commission on Iraq and other member States of the United Nations and the confiscation of Iraqi assets according to res. 778 (1992) is clearly outside the competence of the Security Council and cannot be justified as a measure taken under Chapter VII of the Charter to restore peace."). But see Frederick L. Kirgis, *Claims Settlement and the United Nations Legal Structure*, in UNITED NATIONS COMPENSATION COMMISSION, *supra* note 10, at 115 ("The Security Council has the authority under articles 24 and 29 to create compensation commissions to adjudicate claims stemming from breaches of the peace or acts of aggression. It could do so with binding effect, and without the consent of the respondent state."); Lawrence D. Roberts, *United Nations Security Council Resolution 687 and its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy*, 25 N.Y.U. J. INT'L L. & POL. 593 (1993) ("The only significant restriction upon potential Security Council authority emanates from the political will of its members. Once this hurdle has been overcome, however, and an affirmative statement of purpose has been produced, the constitutional authority of the Security Council to take action is virtually unlimited."); VEIJO HEISKANEN, INTERNATIONAL LEGAL TOPICS 344 (1992) (To meet the "standards of substantive due process," a United Nations sanction resolution "must be rationally related to a legitimate organizational purpose . . ."). At a minimum, a good argument exists that Resolution 687 meets such a due process test because there appears to be a rational relationship between restoring international peace and security and the establishment of a commission to compensate war victims.

19. S.C. Res. 687, *supra* note 16, ¶¶ 18-19, reprinted in 30 I.L.M. at 852.

20. Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991), U.N. SCOR, 46th Year, U.N. Doc. S/22559 (1991) [hereinafter *Secretary-General's Report*], reprinted in GULF WAR CLAIMS REP., *supra* note 10, at II/M-1.

21. S.C. Res. 692, U.N. SCOR, 46th Year, Res. & Dec. at 3, U.N. Doc S/RES/692 (1991), reprinted in 30 I.L.M. 864 (1991). The WBC Claim Panel noted that the "Security Council also acted under Chapter VII when making resolution 692 (1991), in which it decided to establish the Commission . . . Under article 29 of the Charter, '[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.'" WBC Claim Report, *supra* note 4, at 69 n.15.

22. Secretary-General's Report, reprinted in GULF WAR CLAIMS REP., *supra* note 10, ¶ 19, at II/M-4.

[are] subject to approval by the Governing Council.”²³ The Governing Council’s decisions are final and “are not subject to appeal or review on procedural, substantive or other grounds.”²⁴

The Commissioners, who serve on three-member panels, are required to have expertise in fields such as “finance, law, accountancy, insurance and environmental damage assessment.”²⁵ As discussed below, the Commissioners have the primary responsibility for determining the outcome of the claims. Each panel of Commissioners must “report in writing . . . to the Governing Council on the claims received and the amount recommended to be awarded for each claimant.”²⁶ Finally, the Secretariat is charged with providing administrative, technical and legal services to the Governing Council and the Commissioners.²⁷

These three bodies reflect the various roles of the Commission, which include policy-making, administration, fact-finding, adjudication, and financial evaluation.²⁸ Together, these bodies form a largely self-contained organization capable of administering the entire claims process with little need for assistance from the Security Council or from any other international or national governmental or judicial body.²⁹

The Security Council directed the Commission to establish a “process by which [Iraqi] funds will be allocated and claims paid” and to establish “appropriate procedures for evaluating losses, listing claims and verifying

23. *Provisional Rules for Claims Procedure*, U.N. SCOR, U.N. Compensation Comm’n Governing Council, 47th Year, art. 40(1), U.N. Doc. S/AC.26/1992/INF.1 (1992), reprinted in 31 I.L.M. 1053 (1992) [hereinafter *Rules*].

24. *Id.* art. 40(4). Article 41 of the Rules does provide, however, that “[c]omputational, clerical, typographical or other errors brought to the attention of the Executive Secretary within 60 days from the publication of the decisions and reports will be reported . . . to the Governing Council. The Governing Council will decide whether any action is necessary.” *Id.* art. 41. The reference in article 41 to “other errors” appears to give the Governing Council wider discretion in correcting awards than would be permitted under the Arbitration Rules of the United Nations Commission of International Trade Law which refer only to “any errors of a similar nature.” UNITED NATIONS, UNCITRAL ARBITRATION RULES art. 36(1) (1977).

25. *Secretary-General’s Report*, reprinted in GULF WAR CLAIMS REP., *supra* note 10, ¶ 5, at II/M-4.

26. *Rules*, *supra* note 23, art. 38(e).

27. *Id.* art. 34. See also *Secretary-General’s Report*, reprinted in GULF WAR CLAIMS REP., *supra* note 10, ¶ 12, at II/M-4.

28. See *Secretary-General’s Report*, reprinted in GULF WAR CLAIMS REP., *supra* note 10, ¶ 4, at II/M-2. The Commission’s financial responsibilities include, *inter alia*, making arrangements for ensuring payments by Iraq to the Compensation fund. See, e.g., *Arrangements for Ensuring Payments to the Compensation Fund*, U.N. Compensation Comm’n Governing Council, 1st Sess., 10th mtg., U.N. Doc. S/AC.26/1991/2, reprinted in GULF WAR CLAIMS REP., *supra* note 10, at II/GC-7; *Arrangements for Ensuring Payments to the Compensation Fund*, U.N. Compensation Comm’n Governing Council, 2nd Sess., 15th mtg., U.N. Doc. S/AC.26/1991/6, reprinted in GULF WAR CLAIMS REP., *supra* note 10, at II/GC-15.

29. Notwithstanding its independent structure, the Commission is dependent upon the United Nations offices in Geneva and New York to approve its budget and to recruit its personnel. Given the concern over delay in processing the large number of claims submitted to the UNCC, it might be appropriate for the Commission to have more independence in these matters, particularly in light of the fact that the Commission’s functions are not financed by the regular U.N. budget.

their validity and resolving disputed claims in respect of Iraq's liability."³⁰ Accordingly, on June 26, 1992, the Governing Council adopted the "Provisional Rules for Claims Procedure."³¹ Among other things, the Rules specifically set forth the law that the Commissioners must apply to the claims:

In considering the claims, Commissioners will apply Security Council Resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.³²

Accordingly, the panels of Commissioners are the officers of a special legal system developed by the Security Council to process claims against Iraq. Nevertheless, "where necessary" in the claims process, the panels are directed to apply relevant rules of international law.³³

II. The Nature of the Commission's Proceedings

The foregoing brief review of the establishment and structure of the Commission makes clear that the UNCC is not a court or arbitral tribunal in the traditional sense. Moreover, the UNCC differs from the mixed claims commissions that have been a common feature of international dispute resolution over the past 200 years.³⁴ For example, one difference between the Commission's proceedings and the proceedings of the more traditional international tribunals and claims commissions is the fact that the Commissioners are not appointed by the claimants, by Iraq, or by interested governments.³⁵ Rather, they are nominated by the Secretary-General of the United Nations and appointed by the Governing Council.³⁶ Commissioners are not, however, employees of the Secretariat. Instead, the Commissioners serve in their personal capacities in order to ensure their independence in the claims process.³⁷

Another unique feature of the Commission is that the processing of claims does not use the typical adversarial model.³⁸ Generally, the claimants have been permitted only one submission in which to prove their claims and Iraq has not been permitted to file a response to the claims as a matter of right.³⁹ To prevent long delays in the processing of claims, the Governing Council required the Commission not to adopt the adversarial

30. S.C. Res. 687, *supra* note 16, ¶ 19, reprinted in 30 I.L.M. at 852.

31. See Rules, *supra* note 23.

32. *Id.* art. 31.

33. *Id.*

34. See Bederman, *supra* note 13, at 5.

35. Rules, *supra* note 23, art. 21.

36. *Id.* art. 20. Furthermore, the Commissioners are expressly proscribed from having any "financial interests in any of the claims submitted to them or the panel to which they belong." *Id.* art. 21. And, "[t]hey may not be associated with or have financial interests in any corporations whose claims have been submitted to them" *Id.*

37. *Id.*

38. See *infra* notes 82-88 and accompanying text.

39. This has been my experience in handling claims with the Commission.

model.⁴⁰ The goal of prompt processing of claims is reinforced by the strict time limits imposed by the Rules on the panels. Panels normally are to complete their work on the claims before them within six months⁴¹ or, in unusually large or complex cases, twelve months.⁴²

As the Commission begins the task of reviewing the typically large category "E" and "F" claims, its proceedings will likely become more involved than they have been in the past. This point is illustrated by the WBC Claim proceedings where both the claimant and Iraq were requested to make several rounds of submissions and to attend a hearing in Geneva.⁴³ Nevertheless, more complex proceedings at the UNCC will not lead to the introduction of adversarial proceedings in the traditional sense in large measure because the Commission was specifically designed to avoid the delay and higher costs associated with the adversarial process.⁴⁴

A. The Role of the Secretariat

In addition to its administrative role, the Commission's Secretariat is charged with providing "legal support to the Commissioners . . . and assist-

40. Commenting favorably on this aspect of the Commission's structure, Professor Caron noted:

Historical examples of international claims settlement generally have followed an adjudicative model. But there are costs to according the due process inherent in the adjudicative model. Such costs may not be tolerable in the current context. A brief comparison to the operation of the recent Iran-United States Claims Tribunal illustrates how formidable the Gulf War claims process could be. [That tribunal] had a docket of close to 4000 claims. Even with 2,780 smaller of these settled *en masse*, another 420 bank claims dismissed on jurisdictional grounds, and probably another 250 claims settled on an individual basis, the Tribunal operating in three Chambers of three arbitrators is only now, ten years later, nearing the end of its work. In contrast, the Gulf War incident raises the specter of hundreds of thousands, if not millions of claims. Case-by-case adjudication in the case of the Gulf War claims likely would lead to justice greatly delayed and consequentially justice denied.

David D. Caron, *The Gulf War, the U.N. Compensation Commission and the Search for Practical Justice*, BOALT HALL TRANSCRIPT, Fall 1991, at 27.

41. Rules, *supra* note 23, art. 38(c).

42. *Id.* art. 38(d). Article 39 holds out the possibility that in certain cases the Governing Council could extend the review periods set forth in the Rules:

If a panel considering a claim or group of claims cannot complete its work within the allotted time, the panel will notify the Governing Council . . . of the estimated additional time required. The Governing Council will decide whether the panel should continue its work on the claim or group of claims, with a time limit to be decided by the Council, or should be discharged of the claim or group of claims, which would be given to another panel.

Id. art. 39. In fact, the Governing Council recently decided that in large or complex claims, if a panel determines under article 39 that more time is needed to process the claim, it can take an additional six months without seeking approval from the Governing Council. See *Decision Concerning Further Procedures for Review of Claims Under Article 38*, U.N. Compensation Comm'n Governing Council, 19th sess., 57th mtg., at 1, U.N. Doc. S/AC.26/Dec.35 (1995).

43. For a discussion of the WBC Claim, see *infra* notes 115-50 and accompanying text.

44. See, e.g., Caron, *supra* note 40.

ance in obtaining additional information" regarding the claims.⁴⁵ Before the claims are formally presented to the panels to be reviewed on their merits, the Rules require the Secretariat to conduct a preliminary assessment of the claims to ensure that they meet the formal requirements promulgated by the Governing Council.⁴⁶ The Secretariat is also required to report the significant factual and legal issues raised by the claims to the Governing Council, the claimants and to Iraq.⁴⁷ These steps begin the Commission's verification of the claims.

1. *The Secretariat's Preliminary Assessment of the Claims*

In addition to meeting certain formal requirements, all corporate and government claims must contain a statement of claim that pleads the legal and factual elements of the claim with particularity.⁴⁸ These claims must also be "supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss."⁴⁹

Pursuant to article 14 of the Rules, before the claims are submitted to the panels of Commissioners, the Secretariat must make a preliminary assessment of them "to determine whether they meet the formal requirements established by the Governing Council."⁵⁰ Among the items that the Secretariat must "verify" with respect to the corporate and government claims is whether they "contain evidence of the amount, type and causes of the losses."⁵¹

If a claim does not contain such evidence or if it fails to meet any of the Rules' other formal requirements, the Secretariat will informally notify the claimant or entity that submitted the claim and will give it six months to cure the problems.⁵² If the claimant takes no action in response to the informal notification, it will be given formal notification that it has "60 days from the date of that notification to remedy the defect."⁵³ In this circumstance, a claimant is allowed a "second bite at the apple" with respect to proving its claim. However, if the defect is not remedied "within this period, the claim shall not be considered as filed."⁵⁴ Because the dead-

45. Rules, *supra* note 23, art. 34(1).

46. See *infra* notes 50-57 and accompanying text.

47. See *infra* notes 62-67 and accompanying text.

48. See, e.g., U.N. Compensation Comm'n, *Category "E" Claim Form*, reprinted in GULF WAR CLAIMS REP., *supra* note 10, at II/CF-41.

49. Rules, *supra* note 23, art. 35(3). The editor of the Gulf War Claims Reporter has noted that "[g]enerally, the amount of documentation necessary will have a direct relationship to the size of the claim involved: the larger the claim, the more documentation necessary." GULF WAR CLAIMS REP., *supra* note 10, at II-12. However, with respect to the classification of claims by the panels, it should be recognized that claims asserting large losses do not always involve the complex legal or factual issues that would require an extended review period.

50. Rules, *supra* note 23, art. 14.

51. *Id.* art. 14(1)(b).

52. Although not provided for in the Rules, this has been the practice of the Secretariat during my tenure at the UNCC.

53. *Id.* art. 15.

54. *Id.*

lines for filing corporate and government claims are now long past,⁵⁵ a claimant's failure to remedy defects in a claim after receiving an article 15 notification from the Secretariat will almost certainly result in no compensation being awarded.

On the other hand, if the Secretariat determines that a claim "contain[s] evidence of the amount, type and causes of the losses," it does not constitute a decision on the merits of the claim but merely results in the claim being presented to a panel of Commissioners for review.⁵⁶ Then, the panel decides whether such evidence is credible and is sufficient to justify a recommendation to the Governing Council that compensation be awarded.⁵⁷

As the Commission begins to focus its attention on the claims filed in categories "E" and "F," it is anticipated that a large number of corporate and government claimants will receive notification under article 15 in the near future. Such recipients should view the notification as an opportunity to improve their chances of obtaining compensation by resubmitting their claims in conformity with the Rules. Indeed, as the article 15 notifications advise, claimants should seriously consider obtaining legal counsel in making their responses to the notification, as such assistance often results in higher quality submissions which not only conform to the Commission's minimum requirement but also better present the claimant's case.⁵⁸

In accordance with the recent implementation of the "oil for food" deal set forth in Security Council Resolution 986,⁵⁹ a percentage of Iraqi oil sale proceeds must be placed in the Commission's compensation fund.⁶⁰ Thus, the odds that successful corporate and government claimants will eventually receive some compensation appear better now than they did when many of the claims were originally filed.⁶¹ Along these lines, although the deadline is past for filing new category "E" and "F" claims, neither the Rules nor other Governing Council decisions prohibit claim-

55. Except in a very few cases involving civil disorder within a claimant country, or environmental claims submitted by governments, the deadline for submitting category "E" and "F" claims was January 1, 1996. *Decision of the Governing Council Not to Accept Further Corporate and Government Claims After 1 January 1996*, U.N. Compensation Comm'n Governing Council, 17th Sess., 53rd mtg., U.N. Doc. No. S/AC.26/Dec.30 (1995), reprinted in GULF WAR CLAIMS REP., *supra* note 10, at II/GC-119.

56. Rules, *supra* note 23, art. 16(1).

57. Rules, *supra* note 23, art. 35(1) ("Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted.").

58. *Id.* art. 15.

59. S.C. Res. 986, U.N. SCOR, 3519th mtg., U.N. Doc. S/RES/986 (1995), reprinted in GULF WAR CLAIMS REP., *supra* note 10, at II/SC-35.

60. Raymond Bonner, *For Victims of Gulf War, the Checks Are in the Mail: UN Committee Orders Iraq to Pay \$3.2 Billion in Reparations*, INT'L HERALD TRIB., Dec. 18, 1996, at 1.

61. At least one commentator has pointed out that, even if the Commission is unable to pay all of the claims in full, merely obtaining an award from the Commission may be of value to claimants and governments: "[I]t will be useful to governments to have claims of concern to them assessed and evaluated by an international body. This process will provide a sound foundation for the future bilateral settlement of any claims not fully compensated through the UN mechanism." Crook, *supra* note 15, at 156.

ants from supplementing their claims at any time prior to their submission to a panel for review. Thus, even if they have not yet received an article 15 notification, claimants should consider filing additional evidence or argument in support of their claims, if such a filing would improve these claims.

2. *The Secretariat's Report on the Claims*

In addition to making preliminary assessments of the claims, the Secretariat is charged with making quarterly reports to the Governing Council regarding the upcoming claims on the Commission's docket.⁶² Such reports, labelled "Article 16 Reports" by the Commission, must include statistical information regarding the claims, including the name of the claimants, the categories that the claims fall within, and the amount of compensation sought.⁶³ More importantly, the Article 16 Reports "indicate significant legal and factual issues raised by the claims. . . ."⁶⁴

The Rules require the Secretariat to "promptly" circulate the Article 16 Reports to "the Government of Iraq as well as to all Governments and international organizations that have submitted claims."⁶⁵ Given the number of governments that have submitted claims, both on their own behalf and on behalf of their nationals and corporations, the Article 16 Reports are circulated quite widely. Nevertheless, the reports are not considered public documents.⁶⁶

Within ninety days of the circulation of the Article 16 Reports, "the Government of Iraq as well as Governments and international organizations that have submitted claims, may present their additional information and views concerning the report to the Executive Secretary for transmission to panels of Commissioners. . . ."⁶⁷ Significantly, the Article 16 Report is the first communication from the Commission to Iraq regarding specific claims. Iraq's response to these reports is its first opportunity to present its views to the panels of Commissioners regarding both the factual and legal issues raised in the reported claims. The transmission of the Article 16 Reports also presents an opportunity for the claimants to submit additional legal and factual briefing to the Commission on the issues identified by the Secretariat.

62. See Rules, *supra* note 23, art. 16.

63. *Id.*

64. *Id.* art. 16(1).

65. *Id.* art. 16(2).

66. However, because many governments solicit comments on the reports from their claimant corporations and individuals, the number of copies of these "restricted" documents in circulation is probably fairly large. Accordingly, the Commission should consider making such reports available to the broader international legal community. Doing so would increase the transparency of the Commission's proceedings and could spark additional comment and debate on the Commission's work among academics and legal practitioners.

67. Rules, *supra* note 23, art. 16(3). Article 32(2) further provides with respect to article 16 comments that: "[a]ny information received by the secretariat after the expiration of the time-limits as established in article 16 will be submitted when received, but the work of the panel will not be delayed pending receipt or consideration of such information." *Id.* art. 32(2).

3. *The Submission of the Claims to the Panels*

Following the appointment of a specific panel of Commissioners by the Governing Council, the Secretariat is required under article 32 of the Rules to submit a claim or claims to the panel "together with the related documentation, containing the results of the preliminary assessment made by the Secretariat and any other information deemed to be useful for the work of the Commissioners."⁶⁸ The Secretariat must also provide the panel with any materials submitted by Iraq and others in response to the Article 16 Reports.⁶⁹ The Secretariat's preliminary assessment usually takes the form of an extensive memorandum which analyzes the factual and legal issues raised by a claim or group of claims and proposes a claim verification program.⁷⁰ The Commission calls these memoranda "Article 32 Reports."

In the past, the Secretariat has often utilized loss adjusters and accountants to review the claims.⁷¹ It is foreseeable that such experts will make significant contributions to future Article 32 Reports, especially in unusually large or complex cases. Thus, it is reasonable to assume that, in reviewing larger and more complex claims, the panels will receive expert preliminary briefing on verification and evaluation issues, as well as on the legal issues.

Although the Commission's processing system for the category "E" and "F" claims is still in the early stages of its evolution, it is probable that under article 32 the Secretariat will seek to obtain "other information" regarding certain claims where it "deems" that such information would be "useful for the work of the Commissioners."⁷² Such information could include reports and documents relevant to the claims which are publicly available or are available within the United Nations system and which provide useful background information to the panels in their review of the claims. In certain circumstances, the Secretariat might make available to the panel claims that are not part of the group of claims presented to the panel for review.⁷³ These other claims could be used to cross-check asserted losses to ensure that the same loss is not compensated twice. Such other claims might also be used as evidence to demonstrate the existence of certain facts or conditions that are at issue in the group of claims before the panel.

Moreover, pursuant to articles 15 and 32, once the panels have established initial precedents regarding the type of evidence necessary to verify certain losses, the Secretariat may contact some claimants to obtain such evidence before the claims are presented to the panels. Communications

68. *Id.*

69. *Id.* art. 32(1).

70. *Rules, supra* note 23, art. 32(1).

71. *Id.* art. 19(2).

72. *Id.*

73. In fact, in the WBC Claim, the Secretariat gave the Panel "relevant additional documents filed in other Kuwaiti public sector oil company claims." *WBC Claim Report, supra* note 4, ¶ 11, at 5-6.

will be made only in limited circumstances, such as when a claim includes sufficient evidence to pass the preliminary assessment but lacks the specific evidence required by the panel to verify a certain type of loss. Accordingly, most claimants should not expect to receive additional communications from the Secretariat. In fact, it is likely that the majority of claims in categories "E" and "F" will be processed "as is," without any further communication from the Secretariat or the panels to the claimant.⁷⁴

Finally, before submitting claims to the panels, the Secretariat will group them according to, "*inter alia*, the type or size of the claims and the similarity of legal and factual issues."⁷⁵ The rationale for grouping the claims in this manner is to "facilitate the work of the Commissioners and to ensure uniformity in the treatment of similar claims."⁷⁶ Because the formal review period is limited, the objective of the Secretariat's extensive work on the claims prior to their submission to the panels is to minimize the amount of background work that the panels must accomplish prior to rendering a decision on the merits of the claim.

B. The Role of the Commissioners

Concerning the review of corporate and government claims, article 38 of the Rules provides that: "Each panel will make its recommendations on the basis of the documents submitted, taking into account the preliminary assessment conducted in accordance with article 14, any other information and views submitted in accordance with article 32 and any information submitted in accordance with article 34."⁷⁷

Discussing the role of Commissioner panels within the context of both article 38 and the UNCC framework in general, the WBC Claim Panel⁷⁸ concluded that the "task" entrusted to it was twofold:

First, the Panel must determine whether all the costs included by the Claimant in the WBC Claim can be considered a direct result of Iraq's invasion and occupation of Kuwait and thus compensable under the applicable law and the criteria established by the Governing Council. Second, the Panel must verify, using expert advice where necessary, that the costs for which compensation is being sought in the WBC Claim have in fact been incurred

74. It is for this reason that the editor of the Gulf War Claims Reporter was correct in asserting that "[e]arly evidence gathering and appropriate forms preparation and document assembly will likely prove more essential to the success of claims than persuasive argument at later stages of the claims process." GULF WAR CLAIMS REP., *supra* note 10, at II-1.

75. Rules, *supra* note 23, art. 17.

76. *Id.*

77. *Id.* art. 38(c).

78. The WBC Claim Panel Commissioners were: Mr. Allan Philip, a Danish lawyer and arbitrator (chairman); Judge Bola A. Ajibola of Nigeria, a former Judge of the International Court of Justice; and Mr. Antoine Antoun of Lebanon, who serves as the managing partner of Ernst & Young's Paris office. *Executive Summary of the Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blow-out Control Claim (The "WBC Claim")*, U.N. SCOR, U.N. Compensation Comm'n, 51st Year, U.N. Doc. S/AC.26/1996/R.27 (1996).

by the Claimant⁷⁹

The WBC Claim Panel concluded that its understanding of its “main tasks,” which require “determinations of compensability and the verification of compensable claims,”⁸⁰ is consistent with the Secretary-General’s report to the Security Council regarding the implementation of Resolution 687 and the establishment of the Commission.⁸¹ In reaching this conclusion, the Panel adopted the Secretary-General’s understanding of the Commission’s function:

The Commission is not a court or an arbitral tribunal before which parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved. Given the nature of the Commission, it is all the more important that some element of due process be built into the procedure. It will be the function of the Commissioners to provide this element.⁸²

The Panel took further note of the Secretary-General’s Report in which he specifically described the role of the panels within the Commission’s framework:

The processing of the claims will entail the verification of claims and the evaluation of losses and the resolution of disputed claims. The major part of this task is not of a judicial nature; the resolution of disputed claims would, however, be quasi-judicial. It is envisaged that the processing of claims would be carried out principally by the Commissioners. Before proceeding to the verification of claims and evaluation of losses, however, a determination will have to be made as to whether the losses for which claims are presented fall within the meaning of paragraph 16 of Resolution 687 (1991), that is to say, whether the loss, damage or injury is direct and as a result of Iraq’s unlawful invasion and occupation of Kuwait.⁸³

In essence, the Secretary-General proposed, and the WBC Claim Panel held, that the panels must decide both questions of law and questions of fact. There are three preliminary questions of law that the panels must decide prior to moving to the next stage of its inquiry into the compensability of the claims.⁸⁴ First, does the claim meet the minimum pleading

79. *WBC Claim Report*, *supra* note 4, ¶ 87, at 27.

80. *Id.* ¶ 88, at 27.

81. *Secretary-General’s Report*, reprinted in *GULF WAR CLAIMS REP.*, *supra* note 10, at II/M-4.

82. *WBC Claim Report*, *supra* note 4, ¶ 88, at 27-28 (citing *Secretary-General’s Report*, *supra* note 10, ¶ 20, at II/M-7).

83. *Id.*

84. A discussion of such questions of law is largely outside of the scope of this Article. However, it is clear that a panel’s resolution of such questions will have an important impact on the approach that is adopted with respect to verifying particular claims. A panel is not likely to spend its time and resources verifying a claim or a loss element within a claim that *prima facie* is not compensable as a matter of law. Conversely, there may be situations in which a panel is unable to determine whether a claim or a loss element within a claim is compensable until additional information is obtained

and evidentiary standards set forth in the Rules?⁸⁵ Second, does the asserted loss fall within the Commission's jurisdictional grant in Resolution 687?⁸⁶ Third, does the asserted loss meet the Governing Council's criteria for compensation?⁸⁷

Although the Secretary-General apparently did not consider that the Commissioners' mandate to resolve questions of fact cast them in a "judicial" role, fact finding presents the panels with some of their most difficult decisions.⁸⁸ It is for this reason that the Rules provide the panels with

from the claimant or another entity. In such situations, a panel might engage in verification efforts and then later determine that the claim is not compensable on legal grounds.

85. See Rules, *supra* note 23, art. 35.

86. Under Security Council Resolution 687, Iraq is liable only for "direct" losses resulting from its invasion and occupation of Kuwait. S.C. Res. 687, *supra* note 16, ¶ 16, reprinted in 30 I.L.M. at 852. Consequently, claims seeking compensation for losses that the panel decides are "indirect" do not fall within the Commission's jurisdiction. Moreover, claims arising out of Iraqi debts or obligations existing prior to August 2, 1990 also fall outside of the Commission's jurisdiction and must "be addressed through normal mechanisms." *Id.*

87. Notwithstanding that an alleged loss might arise directly out of Iraq's invasion and occupation of Kuwait, the Governing Council has decided that certain losses are not compensable. For example, except under limited circumstances, "members of the Allied Coalition Armed Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in Coalition military operations against Iraq" *Eligibility for Compensation of Members of the Allied Coalition Armed Forces*, U.N. Compensation Comm'n Governing Council, 6th Sess., 27th mtg., U.N. Doc. S/AC.26/1992/11 (1992), reprinted in 31 I.L.M. 1067 (1992). Moreover, the Governing Council determined that "the costs of Allied Coalition Forces, including those of military operations against Iraq, are not eligible for compensation." *Military Costs*, U.N. Compensation Comm'n Governing Council, 12th Sess., 41st mtg., U.N. Doc. S/AC.26/Dec. 19 (1994), reprinted in 34 I.L.M. 253 (1995). The Governing Council also decided that the "trade embargo and related measures, and the economic situation caused thereby, will not be accepted as the basis for compensation." *Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation*, U.N. Compensation Comm'n Governing Council, 4th Sess., 23rd mtg., ¶ 6, U.N. Doc. S/AC.26/1992/9 (1992), reprinted in 31 I.L.M. 1037 (1992) [hereinafter *Propositions and Conclusions*]. In a later decision, the Governing Council explained this exclusion by stating that "losses suffered solely as a result of that embargo are not considered eligible for compensation because the causal link between the invasion and the loss is not sufficiently direct." *Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait Where the Trade Embargo and Related Measures Were Also a Cause*, U.N. Compensation Comm'n Governing Council, 8th Sess., 31st mtg., ¶ 3, U.N. Doc. S/AC.26/1992/15 (1993), reprinted in 34 I.L.M. 244, 245 (1995). Finally, the Governing Council recognized that claimants are under a duty to mitigate damages and instructed the panels not to compensate losses that "could reasonably have been avoided." *Propositions and Conclusions*, *supra*, ¶ 6.

88. One commentator has pointed out that the Secretary-General's statement that the Commissioners' role is a non-judicial one "seems . . . farfetched" because "the UNCC is thereby stripped of its character as a legal institution" Bederman, *supra* note 13, at 19. Bederman continued:

The only question is how the institution is structured to resolve complex interplays of legal and factual questions raised by the claims presented. As the Governing Council has acknowledged, while it reserves for itself the right to issue decisions that articulate general rules concerning the disposition of claims, "it will be up to the Commissioners to identify the applicable principles and apply them to the circumstances of particular cases."

Id.

several tools that they may use to verify asserted losses.

III. The Rules Governing Verification of Claims by the Panels and the WBC Claim Experience

As discussed above, proceedings before the Commission are not adversarial.⁸⁹ Consequently, the Rules do not permit the claimants or Iraq to seek the production of evidence or engage in “discovery” with respect to claims pending before the Commission. Moreover, while the Governing Council clearly intended that the responsibility of verifying and evaluating claims should rest with the panel of Commissioners,⁹⁰ it provided little guidance in the Rules as to how the panels are to verify and evaluate claims that will not be processed “as is” without seeking additional submissions from the claimants or other sources.⁹¹

A. Discovery of Evidence by the Panels

The panels’ authority to obtain additional evidence from the claimants is set forth in article 35 of the Rules. Article 35 requires corporate and government claims to be “supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.”⁹² It further provides that a “panel of Commissioners may request evidence required under this article.”⁹³ Under article 35, the panels may obtain, at least from the claimant, a wide range of information necessary to verify and evaluate a claim.

Furthermore, article 35 does not require the panel to use any particular approach in obtaining evidence from the claimant. Thus, depending on the type and nature of the evidence required to verify and evaluate a claim, the panels could make requests for the production of documents, perform on-site inspections of property, and take testimony from the claimant’s officers or employees in either an oral deposition or written interrogatory.

The Commission, however, has no power to compel the claimant to produce documents or witnesses for depositions or to permit the inspection of its property. However, if a claimant refused to comply with a panel’s request for evidence, the panel would likely proceed in a manner similar to that authorized in proceedings under the UNCITRAL Arbitration Rules.⁹⁴ In such proceedings, “if a party refuses to comply with any of the procedural directions given by the arbitral tribunal, the arbitral tribunal will usually take an adverse inference against that party’s position.”⁹⁵ Sup-

89. See *supra* notes 34-40, 82-88 and accompanying text.

90. See *supra* note 79 and accompanying text.

91. See, e.g., *Rules*, *supra* note 23, art. 35.

92. *Id.* art. 35(3).

93. *Id.* art. 35(4).

94. See UNITED NATIONS, *supra* note 24, art. 28(3).

95. ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 519 (2d ed. 1991). With regard to this indirect power to compel a claimant to produce evidence pertinent to this claim, one commentator has observed that:

porting this point is the fact that the cover page of the category "E" claim form includes a warning that "[t]he Commission will be alert to claims put forward in exaggerated amounts that cannot be substantiated by satisfactory evidence or otherwise justified. The making of such claims may have a prejudicial effect and should therefore be avoided."⁹⁶

While article 35 of the Rules covers the Panel's gathering of evidence from claimants, article 36 provides that a panel may "request additional information from any other source . . . as necessary."⁹⁷ Like article 35, article 36's scope is broad. The phrase "any other source" very likely means that the panel can seek information from Iraq, from other governments that might have information regarding a particular claim, or even from individual "fact" witnesses who might have knowledge of the events involved in a particular claim.⁹⁸ If a panel desires Iraqi participation in the verification of a claim, this article provides the basis for such action.

It is significant that, here too, the Commission lacks the power to compel a third party to submit additional information. However, at least with respect to requests directed to Iraq, the opportunity to participate in the proceedings beyond the role allowed for in article 16 of the Rules should provide sufficient motivation for compliance with such requests.⁹⁹ As to other third parties, it is fair to assume that, at a minimum, those governments, corporations and individuals who have claims pending before the Commission would be interested in assisting the fact finding efforts of the panels, even when those parties' claims are not the subject of that particular inquiry.

B. The Use of Experts by the Commission

In addition to authorizing the panels of Commissioners to obtain evidence from sources other than the claimants, article 36 states that the panels may request "expert advice, as necessary."¹⁰⁰ In addition to the WBC Claim

An international tribunal like this one has no direct means of enforcing its orders; nor do the UNCITRAL Rules provide for any sanctions in the case of non-compliance . . . [H]owever . . . [i]f the documents are not produced and no satisfactory explanations are provided, the arbitral tribunal may in some cases entertain the possibility of drawing a negative inference from the party's failure to respond.

MATTI PELLONPÄÄ & DAVID D. CARON, *THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED: SELECTED PROBLEMS IN LIGHT OF THE PRACTICE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 484-85 (1994).

96. U.N. Compensation Comm'n, *Category "E" Claim Form*, reprinted in *GULF WAR CLAIMS REP.*, *supra* note 10, at II/CF-41.

97. *Rules*, *supra* note 23, art. 36(b).

98. See generally *WBC Claim Report*, *supra* note 4, ¶¶ 5, 6.

99. Because Iraq's role in the Commission's proceedings is not that of a party and in light of its assertion that it is unable to participate more fully due to financial constraints arising out of the United Nations' sanctions campaign, Iraq should not be penalized for failing to respond to a request for additional information. If Iraq fails to respond to a request for information, the panel will simply be required to decide the claim based on the record prepared by the Secretariat and the claimant's submissions.

100. *Rules*, *supra* note 23, art. 36(b).

Panel,¹⁰¹ the panels in the category "B" and "C" proceedings, acting under article 36, relied on experts in various fields in processing their claims.¹⁰²

Although the panels make the final recommendation of the amount of compensation required to satisfy a particular claim, the opinions of experts have had a major impact on the amount recommended by the panels. Indeed, where verification and evaluation matters present financial, economic and technical problems, similar to those before the category "E" and "F" panels, previous claims commissions have given great weight to the reports of independent experts in arriving at a final decision.

For example, in the *I.V.E.M. Claim* before the Franco-Italian Conciliation Commission, the primary issue was the value of certain shares in a company not listed on a public stock exchange.¹⁰³ To assist in its determination of the issue, the Conciliation Commission appointed a Swiss loss adjustment firm to serve as its independent expert.¹⁰⁴ In arriving at its award, the Conciliation Commission "followed the experts' report almost entirely, both on the appropriate method for valuing such factors as the output value of the enterprise . . . and on the financial results of the application of these methods to the particular facts."¹⁰⁵ Responding to the Italian agent's criticism of the experts' report, the Conciliation Commission set forth its legal position with respect to the report:

[T]he opinion of the experts does not bind the Conciliation Commission, which ought to base its findings on its own convictions. At the same time, when it concerns inquiries and assessments which presuppose technical knowledge denied to members of the Conciliation Commission, there is no reason why the latter should not adopt the opinion of an expert — so long as the latter's reasoning is not contrary to the facts which appear on the dossier or to common knowledge or, of course, to the provisions of the law or the dictates of logic.¹⁰⁶

101. See *infra* notes 131-32 and accompanying text.

102. For example, the Secretariat retained the Secretary-General of the International Society of Disaster Medicine to preliminarily examine the claims. Later, the same expert assisted the Category "B" Panel with its review of the claims. *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims)*, U.N. SCOR, U.N. Compensation Comm'n Governing Council, 49th Year, U.N. Doc. S/AC.26/1994/1 (1994), reprinted in 34 I.L.M. 265 (1995). Experts in medicine, psychiatry, labor law and mass litigation assisted the Category "C" Panel with its review of the claims. See "C" Report, *supra* note 10, at 271.

103. V RECUEIL DES DÉCISIONS DE LA COMMISSION DE CONCILIATION 153 (1956) [hereinafter RECUEIL].

104. See GILLIAN WHITE, *THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS* 143 (1965) ("The Conciliation Commission placed confidence in the 'Schweizerische Revisionsgesellschaft A.G.'").

105. *Id.*

106. *Id.* at 142 (citing RECUEIL, *supra* note 103, at 177). The Conciliation Commission continued:

[A]ll that remains for the Conciliation Commission is to ascertain whether the experts may not, by chance, have exceeded the limits of their science and entered into the sphere of law, or whether their arguments ought to be regarded as inconclusive, or whether they conflict with facts known to the Commission.

In light of the massive real and personal property losses, environmental damage, and business losses alleged in the category "E" and "F" claims, the UNCC panels require significant assistance from experts in the fields of accounting, loss adjustment, and the environment in order to efficiently and accurately verify and evaluate the claims and recommend awards. Accordingly, the Commission has recently entered into contracts with several major international loss adjustment and accounting firms, all of whom will provide support to the UNCC in the verification of the category "E" and "F" claims.

As was the case with the experts used in the category "B" and "C" proceedings, as well as those used in the WBC Claim proceedings, the experts providing assistance with the "E" and "F" claims will assist the Secretariat in preparing its preliminary assessment of the claims under article 14 of the Rules and in preparing reports under articles 16 and 32.¹⁰⁷ The experts will then assist the panels with verification and evaluation issues when the claims are formally taken up for review.¹⁰⁸ Expert assistance to the panels likely will include: providing an initial analysis of the claims and advice regarding what further evidence, if any, should be obtained from the claimants or other persons; reviewing new submissions by claimants made in response to requests from the Commission; assisting in the examination of the claimants' experts at oral proceedings; and submitting a final report addressing the technical issues raised by the claims.¹⁰⁹

C. Proceedings in Unusually Large or Complex Claims

When it promulgated the Rules governing the panels' decision of corporate and government claims, the Governing Council was conscious of the fact that some claims would be difficult to resolve within the standard six-month review period, particularly without oral proceedings. Consequently, under articles 36 and 38 of the Rules, additional procedures are authorized for reviewing a claim if a panel determines that the claim is "unusually large or complex."¹¹⁰ In such cases, the Commission's proceedings begin to look more like those of a traditional arbitral tribunal or claims commission. Article 38(d) provides:

Unusually large or complex claims may receive detailed review, as appropriate. If so, the panel considering such a claim may, in its discretion, ask for

Id., Accord *Starrett Housing Corp. v. Government of the Islamic Rep. of Iran*, 16 Iran-U.S. C.T.R. 112, 198-99 (1987) (considering expert's report, tribunal followed principles recognized by the Franco-Italian Conciliation Commission).

107. *Rules*, *supra* note 23, arts. 14, 16.

108. *See, e.g.*, *supra* note 102 and accompanying text.

109. *See id.*

110. For example, article 36 of the Rules states that in unusually large or complex claims, a Panel may "invite individuals, corporations or other entities, Governments or international organizations to present their views in oral proceedings." *Rules*, *supra* note 23, art. 36. It is within a Panel's discretion to determine the format of such proceedings. Therefore, a panel's procedure could simply involve the appearance of a single witness in a deposition-style proceeding or could be more elaborate, involving the appearance of the claimant and Iraq in a full-scale hearing on the merits of the case. *Id.* arts. 36(a), 38(d).

additional written submissions and hold oral proceedings. In such a case, the individual, corporation, Government, international organization or other entity making the claim may present the case directly to the panel, and may be assisted by an attorney or other representative of its choice. The panel will complete its review of the case and report . . . its recommendations to the Governing Council within twelve months¹¹¹

Article 38 authorizes the panels to seek additional “submissions” from the claimants – in other words, legal briefs – and establishes the claimants’ right to present their cases directly to the panels with the assistance of counsel.¹¹² Article 36, on the other hand, focuses on the solicitation of briefing and oral argument from Iraq and others.¹¹³ Article 36(a) provides that a panel may “request further written submissions and invite individuals, corporations or other entities, governments or international organizations to present their views in oral proceedings.”¹¹⁴

Given the several hundred category “E” and “F” claims that assert losses in excess of \$10 million, panels can be expected to regularly classify claims as unusually large or complex. The panels’ primary motivation in so doing will probably be to gain additional time in which to review and verify the claims before reporting their recommendations to the Governing Council. However, it would not be surprising if, in a significant number of the cases, the panel used the classification to hold oral proceedings to obtain specific information from a claimant or other person regarding a particular subject or subjects. Thus, claimants and others should not equate “oral proceedings” with a full hearing on the merits at which the claimants and Iraq will have the right to present their views and arguments on the claims.

D. The WBC Claim Experience

On July 30, 1993, KOC filed the WBC Claim requesting compensation in the amount of \$951,630,871, primarily for the work required to extinguish the well-head fires that were left burning when Iraqi forces withdrew from Kuwait.¹¹⁵ The proceedings which followed provide an excellent example of a UNCC panel’s application of the rules governing the verification and evaluation of corporate and government claims.

111. *Id.* For a discussion of a panel’s ability to take additional time to process a claim, see *supra* note 42 and accompanying text.

112. *Rules, supra* note 23, art. 38.

113. *Id.* art. 36.

114. *Id.* art. 36(a). The language of article 36(a), however, is not as broad as that in article 38(d) in that it does not authorize such persons to present their case (or defense) “directly to the panel,” nor does it provide that such persons “may be assisted by an attorney.” *Id.* art. 38(d). It is therefore possible to interpret the two articles as giving claimants, but not others, special rights in the event that oral proceedings are held. However, such an interpretation seems unnecessarily restrictive. If a panel decides to invite Iraq or another person or entity to appear at an oral proceeding, it is improbable that the panel would prohibit the invited party from making its case directly to the panel or prevent legal counsel from assisting it.

115. *WBC Claim Report, supra* note 4, ¶ 1, at 3.

Although the size of the claim and the complexity of the accounting issues raised therein make it somewhat atypical of the claims in categories "E" and "F," the Panel's approach to reviewing the WBC Claim was straightforward and is likely to influence the Commission's processing of category "E" and "F" claims in the future. Because a substantial portion of the report addresses these issues, the WBC Claim Report is also pertinent to a discussion of the UNCC's verification and evaluation of claims.¹¹⁶

1. *The WBC Claim Panel's Discovery Program*

In addition to a Statement of Claim, the KOC submission in the WBC Claim was comprised of a video tape that provided an account of how the fires were extinguished and five volumes of evidence. These volumes included, among other items, an expert accountant's report prepared by Touche Ross & Co.¹¹⁷ Due to the large amount of compensation sought in the claim, and given the voluminous submission, the WBC Claim Panel's first official act was to issue a procedural order on November 27, 1995 classifying the claim as "unusually large or complex" under article 38(d) of the Rules.¹¹⁸

In the same procedural order, the Panel "instructed the Secretariat to transmit to [Iraq] the documents filed by [KOC] in the WBC Claim, as well as relevant additional documents filed in other Kuwaiti public sector oil claims."¹¹⁹ The Panel then requested Iraq to "submit by 28 April 1996 its response to the Statement of Claim and related documentation, together with any documentation Iraq might wish to rely on in the present proceedings."¹²⁰ Although it is not cited in the report, by sending such documents

116. As opposed to addressing jurisdictional and compensability issues, the principal legal issue that the Panel was required to decide before moving to the verification and evaluation stage of the WBC Claim proceedings was whether Iraq was liable for the hundreds of oil well fires that were set ablaze in the days prior to the liberation of Kuwait. According to the WBC Claim Report, "Iraq denies any responsibility for the oil-well fires, arguing that the fires were caused by allied air raids." *Id.* ¶ 80, at 25. However, the Panel found, based on the evidence and testimony presented, that:

Although part of the damage may be a result of the allied bombing, the bulk of the oil-well fires was directly caused by the explosives placed on the wellheads and detonated by Iraqi forces. In this regard the Panel finds the testimony presented by the Claimant's witnesses at the oral proceedings, which included videotapes of the explosives placed on the wellheads, as well as the Kälin Report, particularly convincing. The Panel also notes that the evidence referred to by Iraq is consistent with this conclusion.

Id. ¶ 85, at 26-27. In any event, the Panel held that under "Governing Council decision 7, Iraq's liability includes any direct loss, damage or injury suffered as a result of 'military operations or threat of military action by either side . . .'" *Id.* ¶ 86 (citing *Criteria for Additional Categories of Claims*, U.N. Compensation Comm'n Governing Council, 5th Sess., 18th mtg., ¶ 21(a), at 5, U.N. Doc. S/AC.26/1991/7/Rev. 1 (1991), reprinted in 31 I.L.M. 1045 (1992)). The Panel stated that, in its view, the Governing Council's decision is "in accordance with the general principles of international law. Consequently, Iraq is liable for any direct loss . . . caused by its own or by the coalition armed forces." *Id.*

117. *WBC Claim Report*, *supra* note 4, ¶ 4, at 3-4.

118. *Id.* ¶ 11, at 5.

119. *Id.*

120. *Id.*

to Iraq and requesting Iraq's response, the Panel was clearly operating under article 36, subsections (a) and (b), of the Rules.¹²¹ On April 22, 1996, Iraq responded to the request with a submission that "consisted mainly of legal argument relating to the Commission's jurisdiction and Iraq's liability, as well as remarks on the technical and financial aspects of the claim."¹²²

The procedural order also contained "extensive" interrogatories to which KOC was "invited" to respond.¹²³ KOC responded to these interrogatories in a timely manner and its responses were also forwarded to Iraq for comment. Again, Iraq took advantage of the opportunity to participate in the proceedings by filing comments on KOC's interrogatory responses.¹²⁴ On May 14, 1996, the Panel issued another set of interrogatories to KOC. The company responded to this second set of interrogatories and, in doing so, submitted another twenty-two volumes of documents "consisting of invoices and other proof of payment documentation" supporting its claim.¹²⁵ Having reviewed the further submissions of KOC, the Panel "determined, inter alia, that in light of the volume of documentation" submitted to KOC, Iraq should be "allowed to file a written response thereto."¹²⁶ Iraq did not, however, file another submission.

Following the first two rounds of interrogatories, from July 12-17, 1996,

a verification team composed of Commissioner Antoun, as the accounting expert member of the Panel, an accounting consultant retained by the Secretariat and two members of the Secretariat's legal staff performed on behalf of the Panel an on-site inspection in Kuwait to examine the accounts, invoices and other documentation underlying the WBC Claim.¹²⁷

While in Kuwait, the verification team reviewed invoices worth approximately \$180 million.¹²⁸

Although unmentioned in the report, the WBC Claim Panel's interrogatories and associated document requests, as well as its inspection of financial documents at KOC's headquarters in Kuwait, were authorized by articles 35(4) and 38(d) of the Rules, under which panels of Commissioners may obtain further evidence and submissions from the claimants.¹²⁹ Likewise, the Panel's decision to permit Iraqi submissions with respect to those claims fell under article 36(a) of the Rules, which authorizes panels

121. Rules, *supra* note 23, arts. 36(a)-(b). Because article 36 provides only that a panel may seek the views of "governments" and information from "any other source," the Panel was careful to address its request to the "Government of Iraq"—not to the "respondent," and sought a "response to the Statement of Claim"—not a "defense." WBC Claim Report, *supra* note 4, ¶ 11, at 6 (emphasis added).

122. WBC Claim Report, *supra* note 4, ¶ 12, at 6.

123. *Id.*

124. *Id.* ¶ 14, at 6.

125. *Id.* ¶ 15, at 6.

126. *Id.* ¶ 16, at 7.

127. *Id.* ¶ 17, at 7.

128. *Id.* ¶ 115, at 35.

129. Rules, *supra* note 23, arts. 35(4), 38(d).

to request information from other sources.¹³⁰

2. *The Use of Experts by the WBC Claim Panel*

The WBC Claim Report is not accompanied by an independent expert's report regarding the accounting and evaluation issues decided by the Panel. This may be due to the fact that Commissioner Antoun, an accounting expert, supervised the drafting of the accounting portions of the WBC Claim Report. Nevertheless, the Panel acknowledged in its report that expert accounting assistance was provided in its review of the claim:

The Secretariat also retained the services of an accounting consultant to assist the Secretariat and the Panel in reviewing the accounting materials submitted by the Claimant and in drafting the interrogatories The accounting consultant also participated as a member of the verification team in the performance of the on-site inspection in Kuwait and in the review of the [Touche Ross] working papers.¹³¹

It is clear from this reference that the accounting expert played an important role in the Panel's verification and evaluation of the documents and other materials submitted by the claimant and Iraq. Moreover, in the WBC Claim, the Secretariat retained the consultant to work with both the Secretariat and the Panel in verifying and evaluating the claim, thereby following the precedent set in the handling of category "B" and "C" claims.¹³² Retaining experts to assist both the Secretariat and the panels appears practical for two reasons. First, both the Secretariat and the panels require expert assistance in their respective roles in verifying the claims. Second, given the panels' limited review period, it is much more practical to use an expert who has already been retained than to require a panel to locate and retain a different expert.

3. *Oral Proceedings in the WBC Claim*

In its second procedural order, the Panel informed KOC and Iraq that it intended to hold a hearing in order "to clarify outstanding issues and to allow oral questioning of the Claimant's experts."¹³³ Such a course was available to the Panel because it had already classified the claim as "unusually large or complex."¹³⁴ On July 27, 1996, two days before the commencement of the oral proceedings, Iraq filed several documents with the Commission.¹³⁵

Two of the documents were *notes verbales*¹³⁶ addressed to the Chairman of the Governing Council, which requested, among other relief, that

130. *Rules*, *supra* note 23, art. 36(a).

131. *WBC Claim Report*, *supra* note 4, ¶ 27, at 9-10. *See also id.* ¶ 17, at 7, ¶ 155, at 35.

132. *See supra* note 94 and accompanying text.

133. *WBC Claim Report*, *supra* note 4, ¶ 115, at 35.

134. *See supra* note 102 and accompanying text.

135. *See WBC Claim Report*, *supra* note 4, ¶ 18, at 7.

136. The *note verbale* is a common type of diplomatic correspondence used to record a conversation, to explain a state's point of view, or to request that particular action be taken by the recipient. *See* JAMES R. FOX, *DICTIONARY OF INTERNATIONAL & COMPARATIVE*

the Governing Council allow Iraq to use money from the Commission's Compensation Fund to finance its legal defense of the WBC Claim and other claims.¹³⁷ Iraq also submitted letters to each of the three Panel members informing them of its request to the Governing Council.¹³⁸

Finally, Iraq filed a Procedural Request asking the Panel to: postpone the hearing until the Governing Council resolved the matter of the financing of Iraq's legal defense; determine that the Panel in fact "requires 'time in excess of that available under article 38(d)'" to complete its review of the claim; grant additional time to Iraq for preparing the legal defense in "its totality"; and, to seek from the Governing Council "any guidance required under the [Rules] to take the aforementioned decisions."¹³⁹

On July 29, 1996, Iraq, assisted by its private international legal counsel and government representatives, "presented argument in support of its Procedural Request."¹⁴⁰ On the following day, KOC, assisted by its outside counsel and government representatives, replied to the Iraqi presentation and objected to the relief sought in Iraq's Procedural Request.¹⁴¹ The Panel took Iraq's request under submission and the proceedings continued, focusing on the Panel's questions regarding KOC's submissions on the merits of the claim. Iraq's representatives continued to attend the proceedings as "observers under protest."¹⁴²

On July 29, 1996, the Panel denied Iraq's Procedural Request holding that "[e]ven a short postponement of the oral proceedings would disrupt the Panel's work plan and prevent it from submitting its report and recommendations within the [required] time limit."¹⁴³ After the Panel issued its ruling, "the Iraqi delegation withdrew from the proceedings," which continued in their absence.¹⁴⁴ Following the oral proceedings, the Panel issued a final set of interrogatories and requests for production of documents to KOC. Iraq also renewed its request to the Governing Council to grant it additional time "to produce a comprehensive Statement of Defense [sic] on the WBC Claim."¹⁴⁵

LAW 10, 223 (1997); MELQUIADES J. GAMBOA, *ELEMENTS OF DIPLOMATIC AND CONSULAR PRACTICE: A GLOSSARY* 314-15 (1966).

137. See Bhushan Bahree, *Iraq Stakes Claim to Funds Earmarked for Compensation*, WALL ST. J. (Eur. Ed.), Aug. 1, 1996, at 2. Although the issue is not discussed further in the WBC Claim Report, *supra* note 4, Mr. Bahree reports that:

[The Iraqi] government now says it needs some of the money to pay for its legal defense against these compensation claims "We do not have the money, quite honestly, due to the [U.N.] Sanctions" to hire lawyers and other experts, Riyadh Al-Qaysi, Iraq's deputy foreign minister said Wednesday. Nevertheless, Iraq has hired a renowned law firm, Lalive & Partners, to press its case for the funds.

Id.

138. WBC Claim Report, *supra* note 4, ¶ 18, at 7.

139. *Id.* ¶ 19, at 7-8 (citing Iraq's Procedural Request).

140. *Id.* ¶ 20, at 8.

141. *Id.*

142. *Id.* ¶ 22, at 8.

143. *Id.* ¶ 21, at 8.

144. *Id.* ¶ 22, at 8.

145. *Id.* ¶¶ 23-24, at 8.

In addition to describing its written and oral proceedings, the Panel noted that, as part of its workings, it "held a number of sessions with the assistance of the Secretariat."¹⁴⁶ These sessions were conducted in private at the Secretariat's headquarters in Geneva. In accordance with article 34 of the Rules, the Secretariat provided administrative, technical and legal support to the Panel.¹⁴⁷

The Panel, having carried out its procedure for verifying and evaluating the WBC Claim, issued a final recommendation that KOC receive \$610,048,547 in compensation of the \$951,630,871 it had claimed for the costs of fighting the oil fires left burning in Kuwait by Iraqi forces.¹⁴⁸ The vast majority of the difference between the recommended amount and the amount claimed was due to the fact that the Panel was unable to properly verify and assess the residual value of capital assets purchased during the WBC exercise that were subsequently used in other activities by KOC.¹⁴⁹ Additionally, the Panel rejected just over \$3,000,000 in claimed costs because they were "indirect losses" which are not compensable under Resolution 687.¹⁵⁰

Conclusion

The most significant challenge facing the UNCC as it focuses on the thousands of corporate and government claims on its docket is to review these claims quickly while providing due process to Iraq.¹⁵¹ It will be difficult to balance these competing interests. If the Commission moves too slowly, a real possibility given the need to verify the large losses asserted in

146. *Id.* ¶ 27, at 9.

147. *Id.* With respect to the Secretariat's close involvement in the Panel's meetings and deliberations, the WBC Claim proceedings followed the precedent set in the category "A," "B" and "C" proceedings. See, e.g., "C" Report, *supra* note 10, at 37-39 (stating that all of the category "C" Claims Panel's meetings were held in Geneva with the Secretariat).

148. See *supra* note 4 and accompanying text.

149. Because KOC argued that the other activities in which the capital assets were used were compensable under Resolution 687, *WBC Claim Report, supra* note 4, ¶ 124, at 38, the Panel agreed not to reject such amounts out of hand but to permit KOC to attempt to prove such losses in its other claims pending before the Commission. *Id.* ¶ 233, at 66.

150. *Id.* ¶¶ 233(c)-(d), at 66. Among the costs that were rejected as indirect, the Panel found that certain "firefighting personnel in question appear[ed] to have been regular staff members of KOC, [and] that the Claimant would have had to make such salary payments even if there had been no invasion." *Id.* ¶ 162, at 48. The Panel also ruled that costs incurred in supporting the firefighting effort at the Wafra oil field were indirect because KOC had earlier withdrawn the Wafra portion of its claim after its compensability was questioned by the Panel in the verification process. *Id.* ¶¶ 218-21, at 63.

151. One commentator has observed that:

A continuing central issue in the work of the Commission will be the balancing of due process against the need for early and final decisions Thus far, in its work on the small claims of individuals, the Commission has clearly sought speed and efficiency, even at the expense of normal procedural safeguards. How the balance will be struck with respect to the larger cases, for which procedures have yet to be devised, remains to be seen.

Ball, *supra* note 15, at 49.

the claims, critics will charge that it is stepping beyond its mandate and assuming the role of a court or arbitral tribunal. On the other hand, if the Commission does not do a professional and thorough job in verifying that the alleged losses actually occurred and are compensable, other critics will allege that the entire process is nothing but "victor's justice" and therefore does not set a legitimate international legal precedent.

The WBC Claim experience shows that the Commission can process an extremely large and complex corporate claim in a timely fashion while still conducting an independent verification program.¹⁵² In order to continue to verify and evaluate the future claims in a manner that is consistent with the sound practices established in the WBC Claim proceedings, the Commission should consider taking the following steps.

First, the Commission must not bend under the natural pressure to churn out a certain number of corporate and government claims each month or year. If Iraqi oil money continues to flow into the compensation fund, it is likely that such pressure will only increase as those with pending claims press for the speedy issuance of an award and payment. However, due to the magnitude of the losses alleged in the category "E" and "F" claims, and the often complex factual situations from which such losses arise, most of the corporate and government claims cannot be handled effectively by the expeditious mass claims-processing techniques used to handle the category "A," "B" and "C" claims.

The Commission's efficient processing of the individual claims may have raised expectations among claimants, interested governments or others that the corporate and government claims will be disposed of in a similar manner. However, these parties must be made aware of the magnitude and number of claims facing the Commission. In fairness to both the legitimate claimants and Iraq, the Commission must be rigorous in the verification and evaluation of corporate and government claims.¹⁵³

152. The initial reaction of one legal commentator to the WBC Claim Report echoed this point:

The work of the first panel shows that the UN will act fast and will safeguard Iraq's right to a fair hearing without letting the aggressor nation control the schedule. This panel also functioned far more like civil law inquisitors than common law judges. It took on the job of investigation and verification, rather than relying on the parties to fight it out.

Jannuzzo, *supra* note 5, at 29.

153. One commentator speculated that proceedings in categories "E" and "F":

[W]ill vaguely resemble a default proceeding in an arbitration, and the Commissioners will have the role of trying to play the devil's advocate and assess whether these claims are realistic or inflated. This is also, I think, because in the back of their minds they will know the overwhelming likelihood that there won't be enough money to pay everyone.

Ulmer, *supra* note 15, at 90. While I believe that the WBC Claim experience demonstrates that the Commissioners are prepared to go well beyond what would be involved in playing the role of the devil's advocate in a default proceeding, Ulmer's second point raises an important issue. If it is true that the pool of money from which claims are to be paid will be insufficient to pay the total amount awarded by the Commission, legitimate claimants have a strong interest in seeing that indirect, ineligible and unsupported claims are identified and dismissed with dispatch by the panels.

Second, the Rules severely limit the scope of Iraq's participation in the proceedings.¹⁵⁴ Even in unusually large or complex claims, where the Commission has more discretion to design the proceedings, panels should be careful not to permit Iraq to have a larger role than that provided for by the Rules.¹⁵⁵ Such a course could lead to serious delays in the Commission's attempt to deal with its massive docket of claims.¹⁵⁶

Third, the Commission should adopt a strictly legal approach with regard to what constitutes a direct and, therefore, compensable loss. This would set clear precedents on compensability issues. To expedite the claims process, the Commission could submit large groups of claims which fail to meet the standards for a compensable claim to the panels for summary disposal. This would leave the Secretariat and panels time to verify and evaluate the remaining claims for which there is a better case for compensation. Given the limited time and financial resources of the Commission, it simply cannot afford to waste resources verifying claims for which there is no legal basis for compensation.

Fourth, because the Commissioners generally serve on a part-time basis and panels meet only a few days each month to work on the claims, the panels rely heavily on the Secretariat's legal officers. Accordingly, the Commission should recruit lawyers with experience working independently and handling large and complex cases under strict time constraints. To meet this need, the Commission has generally recruited experienced attorneys to handle claims pending before the panels. Such lawyers should remain the focus of the Commission's recruitment efforts.

Finally, the Commission should commit sufficient resources to the retention of independent experts in, among other fields, accounting and loss adjustment. These experts must be capable of undertaking the verification and evaluation of complex claims in a limited review period. This

154. See generally *Rules*, *supra* note 23, art. 16(3) (indicating that the only submission that Iraq is permitted to make to the Commission as a matter of right is in response to the Executive Secretary's report pursuant to article 16).

155. Nonetheless, as the WBC Claim proceedings demonstrated, even within the limited scope provided for Iraqi input into the claims review process, opportunities exist for a meaningful Iraqi contribution with respect to verification and evaluation of the claims. See, e.g., *WBC Claim Report*, *supra* note 4, ¶¶ 20, 24. When such opportunities are provided, Iraq should take full advantage of them to further its cause. Rather than rehashing objections to the Commission's jurisdiction over Iraq or making procedural arguments about changing the Commission's Rules as it did in the WBC Claim, Iraq should use such opportunities to argue the legal and factual merits of the claims.

156. Professor Bederman has reported that due to the delays inherent in dealing with a large docket of claims:

Some international claims tribunals were prevented from completing their work, with the result that some awards were issued, a final report was not forthcoming and many (if not most) of the claims were left unadjudicated by the commission. International claims tribunals have been consistently tardy in completing their business.

Bederman, *supra* note 13, at 16. Notwithstanding the allure of allowing Iraq to participate in the proceedings in ways beyond those that the Rules permit, the Commission must avoid creating any situation that would lead to undue delay and to an inability to complete its work in a timely manner.

requirement almost certainly means hiring several in-house experts as well as retaining major international accounting and loss adjustment firms that have the ability to staff claims on short notice with quality professionals from many disciplines. As discussed above, the Commission has taken an initial step in this direction, but this step should be followed through over the long term, possibly by hiring additional outside firms as the number of claims under active review increases.

Taking these and other steps to promote the rigorous verification and evaluation of the claims pending before the Commission will help to ensure that the UNCC realizes its goal of providing swift compensation to claimants while providing due process to Iraq.

